

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

MARY KITTS,

v.
Plaintiff,

Civil Action No.
5:15-CV-0697 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

DOLSON LAW OFFICE
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STEVEN R. DOLSON, ESQ.

FOR DEFENDANT

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DAVID E. PEEBLES
CHIEF U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with those motions on July 12, 2016, during a telephone conference held on the record. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Social Security Act, is VACATED.

- 3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination, and with a directive that the case be reassigned to a different administrative law judge.
- 4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g), and closing this case.



David E. Peebles
David E. Peebles
U.S. Magistrate Judge

Dated: July 15, 2016
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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MARY KITTS,

Plaintiff,

vs.

15-CV-697

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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Decision - July 12, 2016

James Hanley Federal Building, Syracuse, New York

HONORABLE DAVID E. PEEBLES,

United States Magistrate-Judge, Presiding.

A P P E A R A N C E S (by telephone)

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For Defendant: SOCIAL SECURITY ADMINISTRATION
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Official United States Court Reporter
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1 THE COURT: I have before me a request for judicial
2 review of an adverse determination pursuant to 42, United
3 States Code, Sections 405(g) and 1383(c)(3).

4 By way of background, the plaintiff was born in
5 September of 1963, is currently 52 years old. She lives in
6 Syracuse with her husband. She does not drive. She injured
7 her knee, and the record is somewhat equivocal as to whether
8 it occurred in 1998 or 1999. In any event, the knee became
9 symptomatic again in or about July of 2007.

10 Plaintiff underwent arthroscopic surgery by
11 Dr. Seth Greenky on December 1, 2008. There is a diagnosis
12 from Dr. Greenky from December 7, 2009 of complex pain
13 syndrome and chondromalacia of the patella. There is also
14 mention by Dr. Greenky in September of 2011 of chronic
15 regional pain syndrome. That's at 790.

16 Post surgery, at least initially, it was noted that
17 she returned to her pre-operation range of motion but she
18 experienced ongoing pain. She uses a cane to ambulate.
19 That's reflected at several places, including 792. She has
20 in the past reportedly been using a stationary bike and
21 exercising. That's at page 796.

22 The plaintiff receives treatment for pain from the
23 New York Spine and Wellness Center where she attends every
24 three months and sees either Dr. Tallarico and/or Nurse
25 Practitioner Landcastle. Among the treatment regimens that

1 have been attempted are nerve blocks, opioid analgesics,
2 including oxycontin and oxycodone, Percocet, and a TENS unit,
3 as well as a spinal cord stimulator on a trial basis.
4 Physical therapy is also tried.

5 Plaintiff testifies she's in constant pain. She
6 wears a brace. And as I just indicated, uses a cane to
7 ambulate. Her prior work includes at a convenient store as a
8 clerk, cashier and assistant manager, Family Dollar Store
9 where she was a cashier, and A&E Transport where she was a
10 bus monitor for special education children. As hobbies
11 plaintiff completes puzzles, reads books and watches
12 television.

13 The procedural history is that the plaintiff
14 applied for Title II and Title XVI benefits on August 30,
15 2010, alleging an onset date of July 1, 2007. A hearing was
16 conducted by Administrative Law Judge John P. Ramos on
17 September 2, 2011. Judge Ramos issued a decision on
18 November 25, 2011 that was unfavorable to the plaintiff. The
19 Social Security Administration Appeals Council reversed that
20 determination, however, on January 2, 2013 and remanded the
21 matter.

22 A subsequent hearing was conducted on June 25,
23 2013, at which plaintiff testified, as did a vocational
24 expert. On August 13, 2013 ALJ Ramos issued a second
25 decision also finding the plaintiff was not disabled at the

1 relevant times. The Appeals Council denied review on May 22,
2 2015, making that determination the final determination of
3 the Agency.

4 In his decision Judge Ramos applied the familiar
5 five-step sequential test for determining disability. At
6 step two, after finding that the plaintiff had not engaged in
7 substantial gainful activity, Judge Ramos concluded that
8 plaintiff suffers from right knee degenerative joint disease
9 as a severe impairment, but concluded at step three,
10 considering listing 1.02(A), that her condition did not meet
11 or medically equal the listed presumptively disabling
12 conditions that are set forth in the regulations.

13 After surveying the medical evidence, ALJ Ramos
14 determined the plaintiff has the residual functional capacity
15 to lift and/or carry 10 pounds occasionally and less than
16 10 pounds frequently, to stand and/or walk for a total of two
17 hours and sit for a total of six hours in an eight-hour
18 workday. Also concluding she should avoid work requiring the
19 climbing of ladders, scaffold, et cetera. Also noted she
20 requires the use of a cane for all ambulation but retains the
21 ability to carry small objects, such as files, in her free
22 hand. She may also need to elevate her leg up to five times
23 throughout the day for periods up to twenty minutes at a
24 time. The Administrative Law Judge then concluded that
25 plaintiff is unable with that RFC to perform any of her past

1 relevant work due to the exertional requirements of those
2 positions.

3 At step five, with the assistance of a vocational
4 expert, the Administrative Law Judge concluded that plaintiff
5 is able to perform work that is available in the national
6 economy, including as a charge account clerk, an order clerk,
7 and an addresser. Therefore, found that she is not disabled.

8 As you know, the standard that I must apply is
9 extremely deferential. I must determine whether correct
10 legal principles were applied and the determination is
11 supported by substantial evidence.

12 In terms of treating source, I recognize that there
13 is case law, as Mr. Dolson alluded to, that suggests that
14 although the regulations set out a very specific set of
15 factors that must be determined, if a treating source is not
16 given controlling weight for his or her opinions, that will
17 allow me judicial review as to what weight is being given to
18 that determination or that opinion. And the Second Circuit
19 reiterated in *Greek versus Colvin*, 802 F.3d 370, from
20 September 21, 2015, that the decision should lay that out in
21 some detail.

22 The determination of ALJ Ramos in rejecting
23 Dr. Tallarico's opinions, which clearly would indicate
24 plaintiff is disabled and indicating what weight to be given
25 to that opinion, in my view does not meet the requirements of

1 Greek, although it is a close call. My larger concern, quite
2 honestly, is the listing 1.02. As Mr. Dolson correctly
3 points out, to ambulate effectively is specifically defined
4 in 1.00(B)(2)(b) of the regulations, and it states: To
5 ambulate effectively, individuals must be capable of
6 sustaining a reasonable walking pace over a sufficient
7 distance to be able to carry out activities of daily living.
8 And examples are given. Granted, they do include use of
9 handheld devices such as canes in both upper extremities,
10 which is not the case here, but also indicates that it would
11 include the inability to walk a block at a reasonable pace on
12 rough or uneven surfaces. And there is evidence to suggest
13 that plaintiff falls into that category. And also the
14 inability to climb a few steps at a reasonable pace with the
15 use of a single handrail. There is evidence, including
16 plaintiff's testimony, that she may not be able to do that.

17 It may well be that the Administrative Law Judge
18 rejected those provisions, those assertions as not credible,
19 but his decision really is not clear on that score. His
20 discussion of listing 1.02 is very succinct and his
21 discussion concerning credibility is similarly succinct. And
22 when you couple it with Dr. Ganesh's consultative report,
23 which does indicate significant limitations, severe
24 limitations in standing, walking and climbing, I think that a
25 fuller discussion of the listing 1.02 and whether plaintiff

1 can ambulate effectively is required.

2 So I do not find persuasive proof of disability. I
3 think this is something that should be returned to the Agency
4 for a better discussion of both the opinions of Dr. Tallarico
5 and whether or not plaintiff meets or equals listing 1.02.

6 So I will grant judgment on the pleadings to the
7 plaintiff without a directed finding of disability.

8 And I appreciate excellent presentations from both
9 of you. This was an interesting case. I hope you have a
10 good summer.

* * *

C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, DO HEREBY CERTIFY that I transcribed the foregoing proceedings from a digital recording, and that the foregoing is a true and correct transcript thereof.



EILEEN MCDONOUGH, RPR, CRR
Official U.S. Court Reporter